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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, AND RUSSELL E. TRAIN, AS ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD,
Respondent.

BRIEF OF STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTRODUCTION

The issue presented for determination is whether Title 33, Section 1323 of the United States Code requires federal agencies, institutions, or enclaves to apply for and receive a discharge permit issued by a state pursuant to Title 33, Section 1342 of the Code.

The larger issue involved in this review is whether the states may assume without exception their responsibility to regulate discharges into their respective streams. In order to "preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution . . .", 33 U.S.C. Section 1251(b) (1973 Supp.), there must be some assurance that the methodology and enforcement tools to achieve those lofty goals are uniform within all areas of the respective states.

Amicus curiae respectfully submit that the Ninth Circuit Court of Appeals correctly decided this case by holding that Section 1323 required compliance with the procedures and substantive requirements of State issued discharge permits under the federal law.

STATEMENT OF INTEREST OF AMICUS

On September 5, 1974, the State of Maryland assumed its inherent responsibility to administer the National Pollutant Discharge Elimination System permit program, authorized pursuant to Title 33, Section 1342(b) of the Code. Similar to the practice followed in the states of California and Washington, Environmental Protection Agency officials represented that federal installations would not be subject to the state permit procedures. This means that the proposed discharges would not be reviewed through the mandated public hearing requirement under state law, nor would there be a full review by all affected state agencies.

According to the Memorandum of Understanding between the Environmental Protection Agency and Maryland, which evidenced "approval" of the state program, federal applications for a discharge permit are not forwarded to the state for processing. Prior to publication for public notice, Maryland receives a copy of the application together with a summary report prepared

by the Environmental Protection Agency. The parameters for the discharges together with the monitoring requirements are included in this summary report.

There are are approximately 1,200 dischargers of pollutants into Maryland's waters, 48 of which are federal installations discharging approximately from 101 point sources into Maryland waters. Federal installations discharge into water quality limited areas, tributary to the Chesapeake Bay as well as to Patuxent, Potomac and Patapsco Rivers.

Because Maryland has no control over the procedures utilized to issue discharge permits for federal installations, the priority in which the permits are issued and the relationship of discharges from federal installations to the assimilative capacities of the streams are subject to federal determinations only.

SUMMARY OF ARGUMENT

The Federal Water Pollution Control Act, as amended in 1972, was enacted to restore the integrity of the Nation's waters. The methodology to achieve that end relies principally on the traditional police powers of the states and, in fact, Congress recognized the primary responsibility and rights of the states to prevent, reduce and eliminate sources of pollution. In furtherance of that goal, the various States are charged to determine what streams within their boundaries will require the imposition of more stringent requirements than what is considered to be the best practicable control technological standard. The various assimilative capacities of these streams are computed and the loading authorizations are part and parcel of the discharge permit limitations. The permit encompasses the discharge limitations and itself is a limitation subject to review, monitoring, and the enforcement procedures set out in the federal act. The permit is the

end product of the various planning processes mandated under the federal act. The administration of the program and strategy pursued by the various states must relate the processing, issuance, and compliance schedules of all dischargers to achieve reduction of pollution in order to restore the Nation's waters.

The language of Section 1323 (Section 313) of the Federal Water Pollution Control Act Amendments of 1972 is unequivocal in its requirement that discharges and runoffs of pollutants must comply with the state and local requirements. The attempted distinction between substantive and procedural requirements should not be pursued in this case because of the interrelationship of both. In order to lawfully administer the federal applications, the state may not act in such a manner as to interfere with a federal prerogative and indeed federal review of a state-approved discharge permit program can adequately safeguard the federal interests.

ARGUMENT

I.

THE NINTH CIRCUIT CORRECTLY INTERPRETED THE PLAIN MEANING OF THE FEDERAL WATER POLLUTION CONTROL ACT IN DETERMINING THAT FEDERAL FACILITIES MUST COMPLY WITH FEDERALLY APPROVED STATE DISCHARGE PERMIT PROGRAMS.

(a) *The 1972 Amendments should be construed broadly to effectuate the remedial purposes of the Act.*

Title 33, Section 1323 provides, *inter alia:*

> Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State,

> interstate, and local *requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements,* including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . (emphasis added)

Petitioners argue that the term requirements relate only to those substantive requirements such as, effluent limitations or other water quality parameters which would ordinarily be included with the permit. This *Amicus* submits that there essentially is no difference between a substantive or procedural requirement of a discharge permit. If such a distinction existed, the "substantive" requirements would be almost illusory. The inseparability of discharge limitations and permit programs was recognized by Congress in 33 U.S.C., Section 1342(K), which provides that:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 1319 and 1365, with sections 1311, 1312, 1316, 1317, and 1342 . . .

Section 1365 authorizes suit against the United States for violations of effluent limitations. Subsection (f) thereof entwines the substantive with the procedural by providing that "for purposes of this section, the term 'effluent standard or limitation under this chapter' means * * * a permit or condition thereof issued under section 1342 of this Title which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this Title)". *See also, Committee for Consideration of Jones Falls Sewerage System v. Train,* 375 F. Supp. 1148 (D. Md. 1974).

Considering the remedial purpose of the Act and the congressional acknowledgment of responsibilities for water pollution control, the language of Section 1323 unequivocably supports the conclusion that federal facilities must com ly with state permit procedures. In a case involving sim ar language under the Clean Air Amendments of 1970, i.e., 42 U.S.C. Section 1857f, the Court of Appeals of the Fifth Circuit rejected the argument that "requirements" refers only to substantive air quality standards:

> They (defendants) argue that the phrase 'requirements respecting the control and abatement of air pollution means only requirements such as emission standards, and limitations, which they label 'substantive' and does not include mechanisms, e.g., permit systems for enforcing these requirements. Having affixed these new labels, defendants would have us infer that while federal agencies must, and will, comply with the 'substantive', it was not intended that they be bound by the 'procedural', a term which in defendants' construct is sub-silentio pejorative, impliedly denigrating the Congressionally-mandated mechanisms of enforcement to a status of less dignity and import. This recharacterization of the statutory scheme is a semantical red herring. *Alabama v. Seeber,* 502 F.2d 1238, 1245 (5th Cir. 1974).

The state discharge permit process is an essential part of all substantive provisions. The Maryland discharge permit program, approved by the Administrator of the United States Environmental Protection Agency, 39 Fed. Reg. 34601 (1974), illustrates the interdependence of the socalled substantive and procedural provisions. The permit procedure in Maryland, 1 Md. Reg. 08.05.04.08 and .12, provides the only means by which water quality standards and effluent limitations may be employed. The State can only determine applicable standards and

limitations for a particular facility during the administrative process that begins after a permit application is filed. 1 Md. Reg. .08.05.04.08G (1974). The application forms also provide the public with its major source of information. 1 Md. Reg. .08.05.04.08F (1974). Hearings are not discretionary, but are required in every case. 1 Md. Reg. .08.05.04.08G (1974).

The permits specify the allowable amount of discharge. 1 Md. Reg. .08.04.04.08H (1974). In cases where discharges exceed allowabl limits, the permit provides a schedule of compliance. 1 Md. Reg. .08.05.04.08H(3) (1974).

(b) *Other provisions of the Act which specifically exempt federal facilities indicate that federal facilities are not exempted from state discharge permit procedures.*

Specific exemptions for federal facilities appear through the Act. For example, Section 1316 authorizes the Administrator to regulate standards of performance for new point sources. These standards may require the use of the best available technology and may further prohibit discharge of any pollutant. Under 33 U.S.C. Section 1316(c) (1973 Supp.), the states may adopt similar standards and means of enforcement against all new sources except for those owned and operated by the federal government. The legislative history of the Act fails to explain the reason for the exemption.

Section 1318 provides a similar federal-state exemption procedure for monitoring and inspecting point sources. Likewise, Section 1341 provides that an applicant for a federal permit receive state certification. Section 1341(a)(6) expressly exempts federal facilities from the state certification procedures.

The fact that Congress exempted federal facilities from state operations in these three separate sections indicates that the absence of an exemption in either Section 1323 or

Section 1342 was intentional. If Congress had intended federal facilities to be exempt from state permit requirements, it would have expressly exempted them. Instead, Congress provided only for the limited exemptions authorized by the President. 33 U.S.C. Section 1323 (1973 Supp.).

It is apparent that any justification for exempting federal facilities from state permit requirements cannot be inferred from the statute. It is also apparent that the only justification for the Administrator's blanket exemption of federal facilities would lie in the concept of federalism.

II.

THE ISSUANCE OF STATE DISCHARGE PERMITS TO FEDERAL FACILITIES WILL NOT UNDULY INTERFERE WITH THE POWERS OF THE FEDERAL GOVERNMENT.

Although Congress appears to acknowledge the primary responsibilities of the states to control and prevent pollution of the streams of this country, in authorizing the various states to develop permit program procedures the Administrator of the Environmental Protection Agency is given ultimate control to approve or disapprove a program. 33 U.S.C., Section 1251(b), 1342(b)(1973 Supp.) In formulating its procedures, each state must comply with the guidelines established by the Administrator pursuant to Section 1314(h). 33 U.S.C., Section 1342(c)(2) (1973 Supp.). In adopting procedures for a permit program under the act, specifically the states must additionally comply with requirements established by regulation of the Administrator which include pro forma provisions in the permits, review of permits, enforcement, and agreements for exchange of information. 40 C.F.R. Section 124. After the state program has been approved, the state must transmit each permit application received to the Administrator. Under certain conditions, the Administrator may veto the issuance of any state permit. 33 U.S.C., Section

1342(d)(2) (1973 Supp.). The Administrator may also withdraw "approval" under certain circumstances. 33 U.S.C., Section 1342(c)(3) (1973 Supp.).

The Federal Government, therefore, maintains adequate control of state programs to insure that the national or federal interest is safeguarded. The various controls and submissions required by state programs affect only the incidental operations of a federal institution. The fact that the requirements are not inherently inconsistent with federal interests is evidenced by the statutory ability to exempt federal agencies from these requirements when a conflict can occur.

CONCLUSION

The Federal Water Pollution Control Act recognizes the priority of state programs for water pollution control. The language of Section 1323 echos the requirement that all dischargers, including federal installations, adhere to state requirements.

The specific exemptions within the Act which relieve federal agencies from state enforcement and certification procedures, support the premise that if Congress sought to exempt federal agencies from state permitting requirements, Section 1323 would be totally superfluous. Of course, that is not the case for every other sentence within this section is to achieve some meaning, consistent with the purpose of the Act. It should leave no doubt that federal installations, agencies and enclaves are subject to the same permitting requirements as every other discharger.

Respectfully submitted,

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